SAKAPP COMMODITIES (M) SDN BHD

v.

CECIL ABRAHAM

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
NH CHAN JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-02-195-96]
26 OCTOBER 1998

CIVIL PROCEDURE: *Action - Cause of action - Whether limitation can be relied upon as a cause of action*

CIVIL PROCEDURE: *Declaration - Discretion to grant declaration - When court ought not to grant declaratory relief - Specific Relief Act 1950, s. 41*

CIVIL PROCEDURE: *Declaration - Application for - How should court approach such applications - Whether declaration ought to be granted based on hypothetical situation*

CIVIL PROCEDURE: *Declaration - Application for - Cause of action based on limitation - Whether this amounts to using device of declaratory judgment to achieve collateral purpose*

CIVIL PROCEDURE: *Declaration - Jurisdiction of court - Appellate court - When does appellate court have discretion to grant or refuse declaratory relief*

CIVIL PROCEDURE: *Affidavit - Contents - Allegations in affidavit not contradicted by other party - Whether this amounts to admission of allegation*

Due to default of several contracts entered into on the floor of the Kuala Lumpur Commodity Exchange, moneys were being held by the Kuala Lumpur Clearing House in order to meet claims for compensation by aggrieved parties. Eventually, all parties involved, including the two parties to this matter, entered into an agreement with a view to amicably settle all claims. The material clause in the agreement was that the respondent would be entitled to a certain sum of money provided that he successfully applied to the High Court for a declaration to this effect.

The appellant contended that from the moneys mentioned above, the respondent owed them a certain amount being commissions and interests incurred as a result of trading in the commodity futures market through them, a licensed commodity broker. It was in evidence that the respondent had written to the appellant sometime in 1984 stating that he would pay all commissions and

interests due to the appellant subject to verification by a third party of the sum so due. Shortly after, a third party duly verified that a certain amount was due to the appellant as commissions and interests. Further, there was an affidavit filed by the appellant alleging that in an agreement entered into in 1994, the respondent agreed that the verified sum "would be deducted from the final payment of the balance sum ..." This notwithstanding, the respondent successfully applied to the High Court for a declaration that he was entitled to the moneys in question on the ground that any claim to it by the appellant was barred by limitation.

Dissatisfied, the appellant now appealed against the granting of the declaration. While the respondent raised the same arguments relied upon by him at the High Court, the appellant submitted that the learned judge failed to appreciate that the remedy sought was discretionary in nature and that there existed in the present case material upon which discretion ought to have been exercised against the respondent. As to the respondent's contention on the issue of limitation, the appellant averred that based on the respondent's conduct in all the circumstances of the case, allowing him to succeed upon the limitation point amounted to his using the Limitation Act 1953 as an engine of fraud and this would be inequitable.

Held:
Per Gopal Sri Ram JCA

[1] It is beyond argument that the limitation of actions under statute is part of procedural and not substantive law. Limitation is merely a defence to an action. It assumes the existence of a cause of action and does not create one. The defence of limitation cannot be relied upon unless specifically pleaded.

[2] The remedy of declaration is discretionary in nature. Although s. 41 of of the Specific Relief Act 1950 is not a complete code upon the subject of declaratory decrees and the power to make a declaration is almost unlimited, yet, the remedy of declaration may be refused upon settled principles. Generally, the court will not grant a declaratory judgment where an adequate alternative remedy is available or upon hypothetical issues or upon an issue of no practical consequence or where it may be premature to grant a declaration or where a plaintiff is guilty of laches or other inequitable conduct or where a 'cloaked declaration', that is to say, a declaration for collateral purpose or with an improper motive, is sought. This list is by no means exhaustive. It merely demonstrates the wide variety of circumstances in which declaratory relief may be denied in the exercise of discretion.

[2a] The law will not permit an abuse of the declaratory judgment procedure.

[2b] The court should be cautious in granting declaratory relief. However, the learning that has later flowed upon the subject amounts to reminding the court of the need to exercise judicially the discretion to grant a declaration.

[2c] In the absence of a fact pattern entitling a court from withholding relief in accordance with settled practice, a plaintiff should be granted the declaration he seeks.

[3] In the present case, limitation was not relied upon as a defence by either party to the litigation. The respondent's claim to the moneys in question was based upon the contention that the appellant's claim to them was barred by limitation. It was apparent that the respondent was in truth relying upon limitation as a cause of action. And this was precisely what the law does not permit.

[4] The true nature of the declaration sought was hypothetical in that it was dependent upon the appellant bringing an action and the respondent successfully defeating it on a plea of limitation.

[5] The respondent appeared to be using the device of declaratory judgment to achieve a collateral purpose in that he was seeking to establish his title to the moneys in question by relying upon limitation as a cause of action.

[6] Declaratory discretion is vested in the judge at first instance. In an appellate court, the initial function of the court is one of review only. It is only after an appellant has satisfactorily demonstrated that the trial judge has exercised his discretion wrongly in the sense that he has taken into account irrelevant considerations or asked himself the wrong questions or was misdirected himself on the law that the appellate court becomes seised of an original discretion of its own. Nowhere in his brief note has the judge addressed his mind to any of the critical matters referred to above. Accordingly, this was a case which warranted appellate interference.

[7] The allegation in the affidavit filed by the appellant was not denied in the affidavits delivered by the respondent. Hence, the appellant's averment must be taken to have been admitted by the respondent. Thus, it would be inequitable to permit the respondent to assert limitation against the appellant.

[Appeal allowed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Disebabkan kemungkiran beberapa kontrak yang telah dimasuki di Bursa Komoditi Kuala Lumpur, wang telah ditahan oleh Gedung Penjelasan Kuala Lumpur untuk memenuhi tuntutan-tuntutan bagi pampasan pihak-pihak yang terkilan. Akhirnya, kesemua pihak-pihak yang terlibat, termasuk kedua-dua pihak tersebut kepada perkara ini, telah memasuki satu perjanjian dengan harapan untuk menyelesaikan segala tuntutan secara berbaik-baik. Fasal utama dalam perjanjian tersebut sehubungan dengan perkara ini, adalah bahawa responden akan berhak kepada sesuatu jumlah wang yang tertentu kecuali ianya berjaya memohon kepada Mahkamah Tinggi untuk mendapatkan satu pengisytiharan mengenainya.

Perayu telah menegaskan bahawa daripada wang yang tersebut di atas, responden terhutang kepada mereka sesuatu jumlah wang tertentu sebagai komisyen dan faedah yang dialami akibat berdagang dalam pasaran komoditi niagaan ke depan melalui mereka, sebuah broker berlesen. Ianya telah diterangkan bahawa responden telah menulis kepada perayu lebihkurang dalam tahun 1984 menyatakan bahawa beliau akan menbayar kesemua komisyen dan faedah yang kena dibayar kepada perayu tertakluk kepada penentusahan oleh satu pihak ketiga akan jumlah yang kena dibayar sedemikian.

Sejurus selepas itu, satu pihak ketiga telah menentusahkan bahawa satu jumlah tertentu kena dibayar kepada perayu sebagai komisyen dan faedah. Selanjutnya, terdapat satu afidavit yang telah difailkan oleh perayu mendakwa bahawa dalam sesuatu perjanjian yang telah dimasuki dalam tahun 1994, responden telah bersetuju bahawa jumlah yang ditentusahkan itu "would be deducted from the final payment of the balance sum ... ." Meskipun demikian, responden telah dengan jayanya memohon kepada Mahkamah Tinggi untuk satu pengisytiharan bahawa beliau berhak kepada wang yang dipersoalkan atas alasan bahawa mana-mana tuntutan kepadanya oleh perayu telah dihalang oleh penghadan.

Oleh kerana berasa tidak berpuashati, perayu kini merayu terhadap pemberian pengisytiharan tersebut. Sementara responden membangkitkan penghujahan-penghujahan sama yang dihadapkan oleh beliau di Mahkamah Tinggi, perayu berhujah bahawa hakim yang bijaksana telah gagal untuk menghargai bahawa remedi yang dipohon adalah bersifat bidangkuasa dan bahawa wujudnya dalam kes semasa perkara di atas yang mana budibicara seharusnya dilaksanakan menentang responden. Berhubung dengan penegasan responden mengenai isu penghadan, perayu menegaskan bahawa berdasarkan perlakuan responden dalam kesemua keadaan kes tersebut, untuk membenarkan beliau berjaya atas isu penghadan membawa kepada beliau menggunakan Akta Penghadan 1953 sebagai suatu jentera fraud dan ini tidak saksama.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Penghadan tindakan-tindakan di bawah statut adalah sebahagian daripada prosedur dan bukannya undang-undang substantif. Penghadan adalah hanya satu pembelaan kepada sesuatu tindakan. Ianya mengandaikan kewujudan satu kausa tindakan dan tidak mewujudkan sesuatu kausa tindakan. Secara tambahan, pembelaan penghadan tidak boleh diharapkan kecuali diplidkan secara khususnya.

[2] Penghadan tindakan-tindakan adalah bersifat budibicara. Walaupun s. 41 Akta Relief Spesifik 1950 bukannya merupakan kanun yang lengkap berdasarkan hal-perkara pengisytiharan dekri-dekri, dan kuasa untuk membuat sesuatu pengishytiharan adalah hampir tidak terhad, namun begitu, remedi pengisytiharan mungkin ditolak menurut prinsip-prinsip yang tetap. Secara amnya, mahkamah tidak akan memberikan pengisytiharan penghakiman di mana sesuatu remedi alternatif yang mencukupi terdapat atau berdasarkan isu-isu hipotekal atau di atas sesuatu isu yang tidak mempunyai akibat pratikal atau di mana ianya mungkin pra masa untuk memberikan satu pengisytiharan atau di mana seseorang plaintif bersalah kerana laches atau lain-lain perlakuan yang tidak saksama atau di mana sesuatu 'cloak declaration', iaitu boleh dikatakan, satu pengisytiharan untuk tujuan kolateral atau dengan motif yang tidak wajar, telah dipohon. Senarai ini tidak berkesudahan. Ianya hanya menunjukkan pelbagai keadaan yang sungguh luas dalam mana relief pengisytiharan mungkin akan dinafikan dalam melaksanakan budibicara.

[2a] Mahkamah tidak akan membenarkan sesuatu penyalahgunaan prosedur penghakiman pengisytiharan.

[2b] Mahkamah seharusnya berhati-berhati dalam memberikan relief pengisytiharan. Mahkamah perlunya untuk melaksanakan secara kehakiman budibicara tersebut untuk memberikan satu budibicara.

[2c] Dengan ketiadaaan sesuatu cara fakta yang membolehkan mahkmah menahan relief menurut amalan yang tetap, seseorang plaintif seharusnya diberikan relief pengisytiharan yang beliau pohon.

[3] Dalam kes semasa, penghadan tidak diharapkan sebagai pembelaan oleh mana-mana pihak kepada litigasi tersebut. Tuntutan responden kepada wang yang dipersoalkan adalah berdasarkan penegasan bahawa tuntutan perayu kepadanya adalah dihalang oleh penghadan. Ianya jelas bahawa responden sebenarnya bergantung pada penghadan sebagai satu kausa tindakan. Dan ini secara tepatnya adalah apa yang tidak dibenarkan oleh undang-undang.

[4] Sifat sebenar pengisytiharan yang dipohon adalah hipotekal iaitu ianya mengharapkan perayu untuk memulakan satu tindakan dan responden dengan jayanya mematahkannya atas rayuan penghadan.

[5] Responden nampaknya menggunakan cara penghakiman pengisytiharan untuk mencapai tujuan kolateral iaitu ianya cuba untuk menentukan haknya kepada wang yang dipersoalkan itu dengan bergantung pada pengahan sebagai satu kausa tindakan.

[6] Budibicara pengisytiharan terletak pada hakim mahkamah yang pertama. Dalam sesebuah mahkamah rayuan, fungsi pertama mahkamah tersebut adalah hanya untuk mengkaji semula sahaja. Hanya selepas perayu menunjukkan dengan puashatinya bahawa hakim perbicaraan telah melaksanakan budibicaranya secara salah iaitu beliau telah mengambilkira pertimbangan-pertimbangan yang tidak relevan atau menanyakan dirinya soalan-soalan yang salah atau telah tersalah arah akan dirinya sendiri atas undang-undang bahawa mahkamah rayuan akan mendapat budibicara asalnya yang tersendiri. Hakim tersebut telah tidak dalam nota ringkas tersebut memikirkan mana-mana daripada perkara-perkara kritikal yang dirujuk di atas. Sehubungan itu, ini merupakan satu kes yang mewajarkan gangguan rayuan.

[7] Dakwaan dalam afidavit yang telah difailkan oleh perayu tidak dinafikan dalam afidavit-afidavit yang dikemukan oleh responden. Oleh itu, penegasan perayu seharusnya diambilkira sebagai telah diakui oleh responden. Dengan itu, ianya tidak saksama untuk membenarkan responden menekankan penghadan terhadap perayu.

[Rayuan dibenarkan dengan kos.]

Cases referred to:

A-G of Hong Kong v. Zauyah Wan Chik [1995] 3 CLJ 35 ***(refd)***
Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 ***(refd)***
City of London v. Horner [1914] 111 LT 512 ***(refd)***
Everett v. Griffiths [1924] 1 KB 941 ***(refd)***
Faber Merlin (M) Sdn Bhd v. Lye Thai Sang [1985] 2 CLJ 423 ***(refd)***
Hanson v. Radcliffe Urban District Council [1922] 2 Ch 490 ***(refd)***
Hari Nath Chatterjee v. Mothurmohun Goswami [1894] ILR 21 Cal 8 ***(refd)***
Lim Kim Cheong v. Lee Johnson [1993] 1 SLR 313 ***(refd)***
Manggai v. Government of Sarawak [1970] 2 MLJ 41 ***(refd)***
Ng Hee Thoong v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***
Othman v. Mek [1972] 2 MLJ 158 ***(refd)***
Plunkett v. Bull [1915] 19 CLR 544 ***(refd)***

R v. A-G ex p Imperial Chemical Industries Plc [1986] 60 TC 1 ***(refd)***
Rediffusion (Hong Kong) Ltd v. A-G of Hong Kong [1970] AC 1136 ***(refd)***
Russian Commercial & Industrial Bank v. British Bank for Foreign Trade Ltd [1921] 2 AC 438 ***(refd)***
Sia Siew Hong v. Lim Gim Chian [1996] 3 CLJ 26 ***(cit)***
Trawnik v. Ministry of Defence [1984] 2 All ER 791 ***(refd)***
Vine v. National Dock Labour Board [1957] AC 488 ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 4
Specific Relief Act 1950, s. 41

For the appellant - M/s Murthi; M/s Iza, Ng, Yeoh & Kit
For the respondent - M/s Prasad Abraham; M/s Prasad Abraham & Assoc

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S3-24-563-94]

Reported by S Dharmendran

JUDGMENT

Gopal Sri Ram JCA:

This appeal has been brought against the decision of the High Court at Kuala Lumpur granting the respondent (whom we shall refer to as "the plaintiff") certain relief, including a declaration that "the plaintiff as executor of the estate of Loo Cheng Ghee, ("Loo") is entitled to the sum of RM3,500,000 presently held in an interest bearing escrow account in the name of Messrs Nahappan, Dorairaj & Danker as stakeholders". The appellant (whom we shall refer to as "the defendant") has argued that the judge should have refused the declaratory relief sought and dismissed the plaintiff's originating summons.

When the appeal was called on, counsel on both sides informed us that the only point at issue before us was one of limitation. However, in order to appreciate the context in which the point arose, it is necessary to hearken to the factual background against which this appeal rests. There is a long history to the controversy before us. But there is not much dispute about the facts.

The defendant, at all material times, was a licensed commodity broker. It bought and sold all sorts of commodities in the futures market on the floor of the Kuala Lumpur Commodity Exchange ("KLCE"). It was a member of the KLCE. It was also a member of the Kuala Lumpur Clearing House ("KLCCH"). Supervision and regulation of commodity futures trading was in the hands of the Commodity Trading Council ("CTC"). Contracts for the sale and purchase of commodities were governed by the rules and regulations of the KLCE and the KLCCH.

Loo was a client of the defendant. He placed orders with the defendant to buy and sell palm oil in the commodity futures market. Each time Loo placed an order, the defendant entered into a contract with one or more of the other brokers on the floor of the KLCE. The primary obligation of the buyer was to accept delivery of the agreed quantity of palm oil at some future date fixed for performance by the particular contract. If there was default on the part of the seller, then the obligation to make physical delivery was replaced by an obligation to compensate the buyer. The rules and regulations under which commodities were traded provided a mechanism for the settlement of the contracts made on the floor of the KLCE. The mechanism included the payment of compensation to the aggrieved parties out of monies that were deposited with the KLCCH.

At some point in 1984, it became clear that several of the contracts entered into on the floor of the KLCE could not be fulfilled. There were numerous defaults. It transpired that Loo had used several brokers to enter into the palm oil futures contracts upon which default had taken place. The mechanism for the settlement of contracts was activated.

On 24 November 1984, M/s Shook Lin & Bok who were solicitors for KLCCH wrote to M/s Shearn, Delamore & Co who were the solicitors then representing the defendant. In it they gave an account of the monies belonging to the defendant that were being held by their client. Including interest, it amounted to RM20,579,150.45. Out of this sum, RM13,272,929.23 was sent under cover of this letter. The balance of RM7,306,221.22 was retained by KLCCH to meet claims for compensation.

Two days later, on 26 November 1984, Loo wrote a letter to the defendant. He said that in consideration of the defendant releasing the sum of RM13,272,929.23 to him, he would pay all commissions and interest due to the defendant, subject to verification of the defendant's claim by a named third party. About a month later, on 27 November 1984, the third party verified that a sum of RM833,492.17 was due as commissions and interest to the defendant.

Later, disputes then arose over the entitlement to and the amount of compensation. Litigation followed. There were numerous suits. Both Loo and the defendant laid claim to part of the compensation monies. The CTC issued an order freezing payment of the compensation claimed by the defendant and Loo. In the meantime Loo died. However, his estate pursued the matter. The compensation monies which formed the subject matter of litigation were later paid over to M/s Nahappan, Dorairaj and Danker, a firm of solicitors to be held by them as stakeholders.

After many years, the parties to the litigation commenced negotiations for an amicable settlement of their claims. The negotiations were spearheaded by the CTC which understandably wanted a resolution of the long standing disputes. A draft agreement was prepared. It contained a clause providing for the payment of the disputed sum to the plaintiff. But the defendant did not agree to this provision. It claimed a set off in respect of the monies owed to it by Loo. On 10 November 1992, a firm of accountants representing the defendant wrote to the CTC voicing their objections.

Eventually, the parties to the several suits entered into an agreement. They called it "the Settlement Agreement". We will do likewise. The history of the matter is set out in the recitals to the Settlement Agreement which is dated 9 June 1994 and is produced in the record of appeal. For completeness they are set out below.

A. Sometime in March 1984, the Defaulting KLCCH Members were directed and required under Regulation 10(d) of the KLCCH Regulations to put up additional margin requirements and deposit payments which payments the Defaulting KLCCH Members failed to make and were unable to meet, and as a result of which, the KLCE suffered a default in the Crude Palm Oil Futures Market.

B. On the 13th day of March 1984 SAKAPP, SUN, FRANK and JAZAL were in default of payment of the additional margin payment requirements and BP defaulted on the 14th day of March 1984. The total number of defaulted contracts was 5150.

C. Upon the aforesaid defaults, the KLCCH invoked 11 of the KLCCH General Regulations For Future Delivery Business by invoicing back the contracts registered in the name of the KLCCH Members by way of compulsory settlement at the price fixed by the KLCE in accordance with Rule 300(d) of the KLCE.

D. The said invoice back prices were duly paid by the KLCCH to the respective KLCCH members holding buying positions on the contracts that were defaulted on.

E. The KLCE further determined the element of compensation payable to the aggrieved parties of the defaulted contracts as provided for in its Emergency Rule 300(f) and advised the KLCCH that the settlement price should include the compensation element.

F. On the 17th day of March 1984 the then Commodities Trading Council at an emergency meeting resolved in the exercise of its powers under Section 5(c) of the Commodities Trading Act 1980 (CTA) to direct the KLCCH to freeze with immediate effect all funds held by the KLCCH for the accounts of the Defaulting KLCCH Members "pending the outcome of an investigation by the Commissioner of Commodities Trading

into their activities which have brought about defaults in the performance of their contracts, with a view to protecting the interests of persons who have suffered losses as a consequence of the defaults of such members".

G. As a result of the aforesaid defaults and the subsequent dispute between the KLCE and the KLCCH on the issue of compensation payable in accordance with the KLCE Rule 300(f), legal proceedings were commenced by the aggrieved parties to the disputes and the cases outstanding to date are as follows:

(i) Kuala Lumpur High Court Civil Suit No: C2324 of 1984.

Palmco Holdings Sdn Bhd in a representative action sought a declaration from the High Court of Kuala Lumpur that KLCCH was liable to pay them the full settlement price including the compensation element as determined by the KLCE. Alternatively, they sought a declaration that the Defaulting KLCCH Members including another broker company, Intracom (M) Sdn Bhd, were liable on the claim.

(ii) Kuala Lumpur High Court Civil Suit No. 1139 of 1984.

The KLCCH was claiming from M&P a sum of RM2,114,966.36 for defaulting on payment of deposits in the trading of 761 crude palm oil contracts in late February 1984. M&P filed a counterclaim against the KLCCH for a sum of RM198,519.05 for KLCCH's failure to register the said contracts.

(iii) Kuala Lumpur High Court Civil Suit No: C509 of 1984.

SAKAPP sought to challenge the decision of the KLCCH calling for additional margin payments.

(iv) Kuala Lumpur High Court Civil Suit No: C3774 of 1984.

SAKAPP sought to challenge the validity of the KLCCH's decision of the 13th day of March 1984 holding that SAKAPP was in default.

(v) Kuala Lumpur High Court Civil Suit No: C2400 of 1984.

SAKAPP sought an order that the KLCCH was liable to pay them all monies held by the KLCCH in SAKAPP's account with the KLCCH and a declaration that the direction to the KLCCH on 19th March 1984 to freeze all monies held by the KLCCH for the account of SAKAPP is unreasonable, *ultra vires* and void.

(vi) Kuala Lumpur High Court Civil Suits No: C2420 of 1984 and No: C1890 of 1984.

SUN sought to challenge the validity of the KLCCH's decision of the 13th day of March 1984 holding that SUN was in default. SUN also sought a declaration challenging the KLCCH's imposition of a RM1 million buffer.

(vii) Kuala Lumpur High Court Civil Suit No: D2-22-1338-89.

The KLCE obtained judgement in default of appearance against BP on the 27th day of November 1989 for the sum of RM224,955.33 with interest thereon and costs in an action founded on the rights and remedies (against BP) of the successful claimants on the Compensation Fund, which were subrogated to the KLCE following such compensation payments. Consequently, the KLCE commenced proceedings against the KLCCH to garnish part of the said Funds and the garnishee proceedings have been adjourned *sine die* in view of this Agreement.

H. The aggrieved parties and their clients are as set out in Part A and B of SCHEDULE 1 annexed hereto. Part A consists of the aggrieved parties on whose behalf PALMCO instituted legal action and Part B consists of the other aggrieved parties and their clients.

I. The major common client of the Defaulting KLCCH Members at the material time was one Loo Cheng Ghee, Managing Director of Kentucky Fried Chicken, now deceased and currently represented by his Executor.

J. The clients of the Defaulting KLCCH Members are as set out and identified in SCHEDULE 2 annexed hereto.

K. One of the members of the KLCE one Lee Oil Mills (Malaysia) Sdn Bhd (LOM) of 234 Jalan Kapar, 41400 Klang was not paid any compensation as LOM, at the material time being a member of the KLCE was not entitled by virtue of Section 81 (2) of the CTA 1980 to any payment under the Compensation Fund pursuant to Section 81 (2) of the CTA 1980.

L. The KLCE further made determinations allowing or partially allowing claims for compensation and in some cases payments out of the Compensation Fund to the clients of certain Defaulting KLCCH Members as listed in Clause 4 herein including to clients of one SY Commodities Sdn Bhd (SY) of Suite 7.05 Wisma KUMB 113 Jalan Pudu 55100 Kuala Lumpur, a member of the KLCE and presently in liquidation, which payments the KLCE is entitled to be repaid as subrogatee pursuant to Section 89 of the CTA 1980.

M. The KLCCH and KLCE together with PALMCO, the Defaulting KLCCH Members and M&P are desirous of settling the dispute hereinbefore referred to and have appointed Messrs Nahappan, Dorairaj and Danker, Advocates & Solicitors of No. 20 Jalan Pudu Lama, Bukit Mahkamah,

50200 Kuala Lumpur to act as stakeholders (hereinafter referred to as "the Stakeholder") and to make the necessary arrangements in respect of the payment out of the funds currently held by the KLCCH in accordance with the terms and conditions as set out herein.

N. The KLCE and KLCCH are desirous of settling all outstanding claims by the KLCCH including the claim for compensation by the KLCCH in respect of the early termination of the Clearing Services Agreement entered into between the KLCE and the KLCCH and dated the 28th day of October, 1985 on the basis of an ex-gratia payment without any admission of liability by KLCE and on a 'full and final settlement of all claims' basis.

O. Upon settlement being reached upon the terms and conditions contained herein, the Commodities Trading Commission will thereby issue a directive lifting the freeze on the funds currently held by the KLCCH and the KLCCH shall make payment to each and all of the parties as stipulated herein.

Clause 7 of the Settlement Agreement provides as follows:

Simultaneously with the settlement of the sums in the preceding clauses, the KLCCH will pay the sum of RM 3.5 Million (Malaysian Ringgit Three Million and Five Hundred Thousand only) out of the said Funds to the Stakeholder which sum shall be immediately placed by the Stakeholder in an interest bearing escrow bank account to be nominated by the Executor, and shall not be released or in any way dealt with by the Stakeholder pending the outcome of the application to be made by the Executor to the High Court in Kuala Lumpur, for a declaration as to the claim by SAKAPP against the Estate of Loo Cheng Ghee, deceased (hereinafter referred to as "the Proceedings").

The Stakeholder shall upon the expiry of fourteen (14) days from the receipt of the sealed order of court in respect of the Proceedings release the sum held by them under the clause herein in the manner specified in the said Order Provided That all interest accrued on the said sum shall be to the account of the Estate of Loo Cheng Ghee, deceased.

The payments stated in the clause herein shall be in full and final settlement of all claims arising thereon and the said Estate and/or its beneficiaries will not have any further claims against the KLCE and/or KLCCH thereafter or against any other party to this Agreement in respect of the defaulted contracts.

It is pursuant to this clause that the plaintiff took out the originating summons mentioned earlier in this judgment. At the hearing of the summons before the learned judge, it was argued for the plaintiff that the monies in question should be paid to Loo's estate because any claim to them by the defendant was barred by limitation. The learned judge accepted this argument. In a note consisting merely of three paragraphs he said:

1. I agree with counsel for the plaintiff that time, for purposes of limitation, began to run from 27.11.84, the date when the sum due was verified as stated in the deceased's letter dated 26.11.84. So claim statute-barred.

2. In face of those documents, there is no basis for defendants saying in paragraph 16 of affidavit (4) that the agreement was to set off amount due to defendant from final payment.

3. P.S.P 1, 2, 3.

When the defendant applied for the learned judge's grounds of judgment, the foregoing note was made available to its solicitors as the "judgment" of the court. We say at once that the rather short and somewhat cryptic note of the learned judge is not a "speaking judgment", that is to say, a judgment that reveals the thought process by which a court arrives at its conclusion. The note made available by the learned judge merely sets out his decision upon the plaintiff's summons. The absence of proper grounds of judgment which the learned judge was duty bound to produce has seriously impeded this court and has resulted in our having to reconsider the material on record with a view of arriving at a decision upon this appeal.

Before us it was argued for the plaintiff that the declaration was rightly given. In opposing the appeal counsel for the plaintiff, he repeated the arguments he had advanced in the court below.

The defendant on the other hand submitted that the learned judge had overlooked some salient aspects of the case. Thus, the learned judge had failed to appreciate that the remedy that was being sought was discretionary in nature. There existed in the present case material upon which discretion ought to have been exercised against the plaintiff. Additionally, the learned judge ought to have held in favour of the defendant upon the limitation point because of Loo's conduct in all the circumstances of the case. Allowing the plaintiff (in effect Loo) to succeed upon the limitation point amounted to his using the Limitation Act 1953 as an engine of fraud. This ought not to be countenanced. So much for the defendant's submissions in support of the appeal.

In our judgment the present appeal falls to be decided in accordance with settled principles. It is beyond argument that the limitation of actions under statute is part of procedural and not substantive law. As Ong CJ said in *Othman v. Mek* [1972] 2 MLJ 158, at p. 160:

> Statutes of limitation which bar the enforcement of a right by action are rules of procedure only: see *24 Halsbury*, third Edn p. 181. A right which becomes unenforceable merely by reason of limitation does not *ipso facto* perish or vanish into thin air: see *Holmes v. Crowther* [1970] 1 WLR 835 where it was held that, although under s. 18(5) of the Limitation Act 1939, arrears of

> mortgage interest outstanding for more than six years are irrecoverable by action, the mortgagors nevertheless were only entitled to the equitable remedy of redemption provided that they paid all arrears of mortgage interest, whether statute-barred or not.

In the same case, Ong Hock Sim FJ, said (at p. 165):

> Statutes of limitation (as in this case) which bar the remedy, but not the right, are rules of procedure only: (see *24 Halsbury* third Edn p. 181).

Further, it is well established that limitation is merely a defence to an action. It assumes the existence of a cause of action and does not create one. For, as pointed out by Sir Richard Couch, when delivering the advice of the Board of the Privy Council in *Hari Nath Chatterjee v. Mothurmohun Goswami* [1894] ILR 21 Cal. 8, at p. 18 (PC): "The intention of the law of limitation is, not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right." Further, the defence of limitation cannot be relied upon unless specifically pleaded. (See, s. 4 of the Limitation Act 1953.)

It is noteworthy that in the present case, limitation is not being relied upon as a defence by either party to the litigation. A reading of the affidavits exchanged before the High Court and the arguments of counsel as recorded by the learned judge make it abundantly clear that the plaintiff's claim to the monies in question is based upon the contention that the defendant's claim to them is barred by limitation. In effect, what the plaintiff is saying is really this: "you (the defendant) cannot have the monies in question because **if** you bring an action to recover them, your claim will be defeated **if** I successfully plead limitation. I am therefore entitled to those monies." Putting aside for a moment the hypothetical element, it is apparent that the plaintiff is in truth relying upon limitation as a cause of action. And this is precisely what the law does not permit. In any event, the passage of time did not have the effect of extinguishing the defendant's undoubted rights to the monies in question: *Othman v. Mek (ibid).*

It is beyond dispute that the remedy of declaration is discretionary in nature. Section 41 of the Specific Relief Act 1950 reads as follows:

> Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and **the court may in its discretion** make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

> Explanation – A trustee of property is a 'person interested to deny' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee. (Emphasis added.)

Although s. 41 is not a complete code upon the subject of declaratory decrees (*Attorney General of Hong Kong v. Zauyah Wan Chik* [1995] 2 MLJ 620) and the power to make a declaration is almost unlimited (*Hanson v. Radcliffe Urban District Council* [1922] 2 Ch. 490, at p. 507 per Lord Sterndale M.R.) yet, the remedy of declaration may be refused upon settled principles. Thus, generally speaking, the court will not grant a declaratory judgment where an adequate alternative remedy is available (*Manggai v. Government of Sarawak* [1970] 2 MLJ 41) or upon hypothetical issues or upon an issue of no practical consequence (*Lim Kim Cheong v. Lee Johnson* [1993] 1 SLR 313) or where it may be premature to grant a declaration *(Rediffusion (Hong Kong) Ltd v. A-G of Hong Kong* [1970] AC 1136) or where a plaintiff is guilty of laches (*Faber Merlin (M) Sdn. Bhd. v. Lye Thai Sang* [1985] 2 CLJ 423; [1985] 2 MLJ 380) or other inequitable conduct (*City of London v. Horner* [1914] 111 LT 512) or where a "cloaked declaration", that is to say, a declaration for a collateral purpose (*Trawnik v. Ministry of Defence* [1984] 2 All ER 791) or with an improper motive, is sought (*Everett v. Griffiths* [1924] 1 KB 941 at p. 960). We wish to make it plain that this list is by no means exhaustive. We merely seek to demonstrate the wide variety of circumstances in which declaratory relief may be denied in the exercise of discretion.

In the *Rediffusion* case *(ibid)*, Lord Diplock made clear the difference between jurisdiction and discretion in a passage that merits recall. He said (at p. 1155):

> When considering an action claiming relief in the form of discretionary remedies only it is thus important to distinguish between the jurisdiction of the court to entertain the action at all, i.e., to embark upon the inquiry whether facts exist which would entitle the court to grant relief claimed, and a settled practice of the court to exercise its discretion by withholding the relief if the facts found to exist disclose a particular kind of factual situation. The application of a discretion to refuse relief even though this may be pursuant to a settled practice is an exercise of jurisdiction, not a denial of it.

That the law will not permit an abuse of the declaratory judgment procedure is illustrated by *Trawnik v. Ministry of Defence (supra)*. There, the plaintiffs were West German residents whose houses adjoined a military airfield occupied by the British. They brought an action for a declaration in England claiming that the Ministry of Defence should not use the airfield so as to cause a nuisance to the plaintiffs by noise. The Ministry applied to have the action struck out on the ground that it should have been properly brought as an action in tort, in which event a complete defence would be available to it under the Crown Proceedings Act 1947. Megarry V-C., when granting the application said (at p. 797):

> If a prospective defendant is immune from liability in tort, I do not think that it is open to a plaintiff who will suffer from his acts to avoid that immunity by the simple device of framing the proceedings as a claim for declarations instead of as a direct claim in tort. The immunity is in tort, and no alteration in the mode of proceeding will alter that. It seems to me to be improbable in the extreme that, apart from the 1947 Act, the position could be that the Crown is immune from all proceedings in tort save that a declaration can be made that certain conduct by the Crown is tortious and wrong, and should not take place or be continued. I do not think that it would make any difference even if the declarations sought were to be reworded so as to speak of the rights of the plaintiffs rather than the wrong of the defendant. You do not prevent a claim for a declaration from being a claim in tort by saying that what you seek is not a declaration that the acts of the defendant are unlawful or tortious, but a declaration that you have a right not to be injured by the defendant's unlawful acts or torts.

It has been said that the court should be cautious in granting declaratory relief. Thus, Viscount Finlay in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.* [1921] 2 AC 438, 445 said that the power to grant declarations should be "exercised sparingly," "with great care and jealousy," and "with extreme caution". However, the learning that has later flowed upon the subject points to Viscount Finlay's language as merely reminding a court for the need to exercise judicially the discretion to grant a declaration. Viscount Kilmuir LC, made this clear in *Vine v. National Dock Labour Board* [1957] AC 488 when he said (at pp. 499):

> The granting of a declaration is a matter of discretion, and, in view of the opinions expressed by the majority of the Court of Appeal, I have considered what was said on this subject in your Lordships' House in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd* [1912] 2 AC 438. In that case Lord Finlay said, in the course of his dissenting opinion: 'The question in what cases the jurisdiction to give a declaratory judgment should be exercised has been considered in a number of cases which were called to our attention by Mr Hogg.' Lord Finlay then cited the expressions used in those earlier cases: 'sparingly,' 'with great care and jealously,' 'with extreme caution.' I agree that the discretion should not be exercised save for good reason. On the other hand, I find helpful the Scottish tests set out in that case by Lord Dunedin, who said (at 488): 'The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.' It seems to me that, however 'cautiously' or 'sparingly' the discretion is to be exercised, this is a case in which the judge was right to grant a declaration.

Absent a fact pattern entitling a court from withholding relief in accordance with settled practice, a plaintiff should be granted the declaration he seeks. We would, with respect agree with the following remark of Lord Oliver in *R v. Attorney-General, ex p Imperial Chemical Industries Plc* [1986] 60 TC 1 at p. 64:

> [I]t does seem to me that it must be wrong in principle when a litigant has succeeded in making good his case and has done nothing to disentitle himself to relief, to deny him any remedy unless, at any rate, there are extremely strong reasons in public policy for doing so.

We have thus far referred to the element of discretion in the remedy of declaration. What calls for emphasis is that declaratory discretion is vested in the judge at first instance. In an appeal of the nature in the present instance, the initial function of this court is one of review only. It is only after an appellant has satisfactorily demonstrated that the trial judge had exercised his discretion wrongly in the sense that he had taken into account irrelevant considerations or omitted relevant considerations or asked himself the wrong question or had misdirected himself on the law that this court becomes seised of an original discretion of its own.

Applying what we apprehend to be settled law to the facts of the present case, we are compelled to the conclusion that the declaration sought by the plaintiff ought to have been refused to him. In the first place, as we have earlier observed, this is a case where the plaintiff has used limitation as a cause of action contrary to established authority. Second, the true nature of the declaration sought is hypothetical in that it is dependent upon the defendant bringing an action and the plaintiff successfully defeating it on a plea of limitation. Third, the plaintiff appears to be using the device of the declaratory judgment to achieve a collateral purpose in that he is seeking to establish his title to the monies in question by relying upon limitation as a cause of action. In accordance with settled practice, discretion ought to have been exercised against the plaintiff.

Nowhere in his brief note has the judge addressed his mind to any of these critical matters. Accordingly, this is a case which warrants appellate interference and the defendant is entitled to a dismissal of the summons.

There is yet another reason why the defendant should succeed on equitable grounds. In para. 14 of the affidavit of Ler Cheng Chye (the defendant's director) dated 1 September 1994 and filed on the defendant's behalf, it is alleged that there was an agreement between Loo and the defendant that the verified sum "would be deducted from the final payment of the balance sum which was yet to be paid to the defendant." This important allegation of fact has not been denied in the affidavits delivered by the plaintiff. In accordance

with established principles governing the judicial appreciation of affidavit evidence, the defendant's averment must be taken to have been admitted by the plaintiff. As this court observed in *Ng Hee Thoong v. Public Bank Bhd.* [1995] 1 MLJ 281, at p. 286, "it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted:"

Based on the foregoing evidence it has been argued before us by the defendant that the plaintiff ought not to be permitted to rely on limitation to defeat the defendant's right to the monies in question because it would be inequitable to do so. In support of this argument, counsel relied upon the following passage in the judgment of this court in *Sia Siew Hong v. Lim Gim Chian* [1996] 3 CLJ 26; [1995] 3 MLJ 141, 155-156:

> The doctrine of estoppel – whether one calls it promissory estoppel, estoppel by encouragement or estoppel by convention does not really matter – has reached such a stage that it may be used to deprive a litigant of the benefit of a procedural statute such as the Limitation Act 1953. The law upon this subject has been stated by Edgar Joseph Jr J (as he then was) in *Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at pp. 244-245. A reading of his Lordship's judgment in that case has left me with the impression that little or nothing may be usefully added to the learning contained therein.
>
> Another way of stating the doctrine when applying it to written law is comprised in the maxim 'equity will not permit statute to be used as an engine of fraud'. It is a doctrine of wide operation. Its content was explained by Mohamed Azmi SCJ in *Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291 at p 296 in the following words:
>
> > It is not a fraud in the common law sense, but an unmeritorious and unconscionable conduct which is known as constructive or equitable fraud (see *Spry on Equitable Remedies* (2nd Edn) at p. 236).
>
> The doctrine, when invoked, has the effect of precluding a litigant who is guilty of unconscionable or unmeritorious conduct from relying upon a statutory provision that would defeat his opponent's case. An application of the doctrine requires a meticulous examination of the facts and circumstances of the particular case to determine whether there has been any inequitable conduct. The doctrine has been applied to several statutes, including those governing contracts, wills, trusts and assignments. The categories of statutes to which the doctrine may be applied are not closed and I am certainly unable to find any serious impediment in applying it to bar a litigant from raising and relying upon the provisions of the Limitation Act 1953.

In *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd.* [1995] 3 MLJ 331, at p. 344 the Federal Court observed as follows:

> The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.
>
> Edgar Joseph Jr J (as he then was) in an illuminating judgment in *Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at p. 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act 1953.

In the present instance, the admitted promise by Loo to pay the sum legitimately due to the defendant out of the balance of the monies which, according to other evidence earlier adverted to, were in the hands of KLCCH. Applying the principles set out in the cases referred to a moment ago to the facts and circumstances of the instant case, it would, in our judgment, be inequitable to permit Loo, and hence his estate represented by the plaintiff, to assert limitation against the defendant.

We must make mention that in arriving at our conclusion on this branch of the case we very much have in mind the judgment of Isaac J, in *Plunkett v. Bull* [1915] 19 CLR 544 where he said (at p. 548):

> ... in cases of this sort the court scrutinizes very carefully a claim against the estate of a deceased person. It is not that the court looks on the plaintiff's case with suspicion and as *prima facie* fraudulent, but it scrutinizes the evidence very carefully to see whether it is true or untrue.

In the present case it was open to the plaintiff to deny the existence of any such promise as alleged by the defendant. Had this happened, and the defendant wished to pursue the matter further, the issue would have become a disputed question of fact necessitating the conversion of the originating summons into a writ for the purpose of taking *viva voce* evidence. However, the plaintiff's admission of the promise alleged against Loo makes any further inquiry into the matter unnecessary.

It is a matter of regret that the learned judge failed to address his mind to the relevant evidentiary material that had been placed before him. Had he done so, and applied his judicial mind to the relevant principles of law, he would not have reached the conclusion he did. In these circumstances, our duty as an appellate court lies very clearly before us: to intervene and correct the error into which the learned judge fell.

For the reasons already given, we are of opinion that the appeal must be allowed. The declaration and other orders made by the judge are set aside. The plaintiff's originating summons is dismissed. The costs of the appeal and those in the court below, including the costs of the plaintiff's solicitors must be taxed and paid out of Loo's estate. The deposit paid into court shall be refunded to the appellant.

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